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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1456

SALYER LAND COMPANY, a California corporation, C. EVERETTE SALYER; FRED SALYER; LAWRENCE ELLISON; and HAROLD SHAWL,

Appellants,

vs.

TULARE LAKE BASIN WATER STORAGE DISTRICT, a public district,

Appellee.

On Appeal from the United States District Court for the Eastern District of California.

BRIEF FOR THE APPELLANTS.

Opinions Below.

The opinion of the United States District Court for the Eastern District of California has not been reported. Copies of the memorandum and order convening a three-judge court, of the memorandum and order of that court, and of the concurring and dissenting opinion of Circuit Judge Browning are printed in the Appendix.

Jurisdiction.

This suit was brought under 28 U.S.C. §2281, to restrain the enforcement, operation and execution of a

State statute as unconstitutional. The judgment of the United States District Court (three judges) was rendered February 17, 1972, and entered March 10, 1972. Notice of appeal was filed in that court on March 14, 1972. The jurisdictional statement was filed May 8, 1972, and probable jurisdiction was noted June 26, 1972. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U.S. Code, §§1253 and 2101(b).

Statutes Involved.

Sections 41000 and 41001 of the California Water Storage District Law (Water Code, §§41000 and 41001) are as follows:

> "§41000. Qualification. Only the holders of title to land are entitled to vote at a general election.
>
> "§41001. Vote in precinct; number of votes. Each voter may vote in each precinct in which any of the land owned by him is situated and may cast one vote for each one hundred dollars ($100), or fraction thereof, worth of land, exclusive of improvements, minerals, and mineral rights therein, in the precinct."

The Question Presented.

Does a statute which restricts the franchise in a water storage district to landowners, and grants each of them one vote for each $100 of assessed valuation, deny farmers and residents not owning land, and all landowners smaller than the largest, the equal protection of the laws?

Statement of the Case.

Plaintiffs C. Everette and Fred Salyer are two of the eleven directors of defendant Tulare Lake Basin Water Storage District, which comprehends 193,000 acres in Kings and Tulare Counties, California. Plaintiff Salyer Land Company is a large owner and lessee of land in that district. Plaintiff Harold Shawl is a small landowner, and plaintiff Lawrence Ellison is a resident of the district who owns no land. All joined in an action filed in the United States District Court for the Eastern District of California on May 5, 1970, challenging the constitutionality of §§41000 and 41001 of the California Water Code, which limit the franchise in water storage districts to landowners, and weight the ballot by granting one vote for each one hundred dollars of assessed valuation. The complaint also alleged that the district was malapportioned.

On November 13, 1970 United States District Judge Crocker filed a memorandum and order stating that the complaint "presents a substantial constitutional question as to whether the sections of the California Water Code are in conflict with the United States Constitution", and convening a three-judge court. That court, which was composed of Circuit Judge Browning and District Judges Crocker and Schnacke, received the case on an agreed statement of facts, and rendered its decision February 17, 1972. The majority, composed of Judges Crocker and Schnacke, held Water Code sections 41000 and 41001 constitutional, sustaining both the exclusion of non-landowners from the franchise and the weighting of that franchise according to assessed valuation. Circuit Judge Browning concurred in so much of the opinion as excluded non-

landowning residents from the ballot, but dissented from the exclusion of farmer lessees and from the weighting of the franchise by assessed valuation. All three judges agreed that the district was malapportioned, the majority finding its failure to redivision itself for forty years "a classic violaton of equal protecton", and it was directed "to submit a plan to correct this malapportionment within six months of the date this decision becomes final". Plaintiffs have appealed from that part of the judgment sustaining the validity of §§41000 and 41001 of the Water Code. The defendant district has not appealed that part of the judgment which directs that it be reapportioned.

Summary of Argument.

In "landowner" districts such as the one at bar all landowners are permitted to vote, whether or not they are residents, but farmers who lease rather than own land are denied the franchise. Their interest in the district's operations is patent, and Circuit Judge Browning dissented from the majority below on the issue of farmer lessee exclusion:

> "This group's interest in the district's projects to increase the water available for farming and to improve its distribution is indistinguishable from the interest of the owners. They are also equally interested in the cost of the district's projects, for this expense will be passed on to them by express agreement or in the form of increased rentals. *See, e.g., Phoenix v. Kolodziejski, supra,* 399 U.S. 204, 210-11. And obviously the state's interest in intelligent and responsible decisions regarding the district's water management program is not advanced by excluding those who actually farm the land."

Residents of the District otherwise qualified to vote ought not to be excluded simply because they do not own land. The primary concern of this district is with acquiring water in time of shortage and repelling it in time of flood. These concerns are of such general and public importance that the resident citizen ought not to be excluded. The plaintiff Lawrence Ellison is a non-landowner resident who is not permitted to vote in district elections. The record makes it clear that he is interested in water matters, as is any mature citizen who lives in the area; his situation is not distinguishable from that of the non-landowning bachelor who could not vote in the Union Free School District, the franchise being there limited to landowners and parents of school children. Kramer was interested in education; the plaintiff Lawrence Ellison is interested in water. This Court struck down the exclusion of the interested bachelor, although landless and childless. *Kramer v. Union Free School District*, 395 U.S. 621 (1969). Exclusion of plaintiff Lawrence Ellison, although landless, denies him the equal protection of the laws. *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

The parceling of the franchise according to assessed valuation has delivered the affairs of the defendant district into the hands of the largest landowner, The J. G. Boswell Company, which has resulted in a system whereby there has been no general election since 1947. Under §§41000 and 41001 of the California Water Code, The J. G. Boswell Company has 37,825 votes in the defendant District; the franchise is openly and candidly based on wealth. The scheme by which the District is governed cannot withstand even momentary analysis. As this Court stated in *Harper v. Virginia*

State Board of Elections, 383 U.S. 663 (1966), "A state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes affluence of the voter . . . an electoral standard". See the statement in *Gordon v. Lance*, 403 U.S. 1 (1971):

> "While Cipriano involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. See Stewart v. Parish School Board, 310 F. Supp. 1172 (E.D. La.) aff'd, 400 U.S. 884 (1970)."

Circuit Judge Browning dissented from the majority below on the issue of weighted voting:

> "There is nothing in the record to support the assumption that a small landowner is less likely than a large one to possess the information and understanding of water development problems that is requisite to intelligent and responsible voting on the affairs of a water storage district. *Cf. Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966). And the landowner's interest in finding and implementing solutions to those problems is no less acute because his operation is small. Efficient production from his smaller acreage may be of greater economic consequence to him; and the lesser absolute share of the cost of district projects he may be required to bear may impose a greater burden."

ARGUMENT.

Legislation Denying the Franchise to Residents and Farmers in the Defendant District Who Own No Land, and Apportioning the Franchise Among Landowners on the Basis of Assessed Valuation, With One Vote for Each $100, Denies the Equal Protection of the Laws to Such Residents and Farmer Lessees, and to All Landowners Smaller Than the Largest.

California and a number of the Western states have landowner districts for the production and conservation of water. The notion of landowner participation in the franchise, whether or not they be resident, is genuine enough. The interest of a nonresident landowner is real, and there would appear to be no constitutional barrier to allowing such nonresident to vote. In fact there are some landowner districts that have no residents; exclusion of all nonresidents would mean that there could be no electorate. The quarrel of these appellants is not with the system whereby nonresident landowners have the franchise; it is the weighting of that vote by assessed valuation, and the exclusion of nonlandowner residents and farmer lessees.

The vote in the court below was two to one on the issue of participation of nonresident farmer lessees, although the majority did not discuss the issue. On the issue of nonlandowning residents, the court below was unanimous in its decision against these appellants. It is respectfully submitted that the court below was wrong. It is a heavy thing to say that a citizen of the United States may not vote in a public election held in the community in which he lives. The subject matter of the election ultimately is water; in California the only element more closely allied to the citizen's welfare would be the air itself.

The suggestion that without such exclusion the state might not be able to create water storage districts is not impressive. Irrigation districts are common in California and in those districts only residents may vote. Some irrigation districts have more residents than the defendant District; some have less. This District has received hundreds of thousands of dollars in federal funds. All citizens have a joint and common interest in those funds, and a joint and common interest in seeing that they are wisely spent. All citizens have a joint and common interest in seeing that an agency of government is well and properly run. The operations of the Department of Defense are the proper concern not only of military men alone, as the operations of the Department of Agriculture, Department of Commerce, and Department of Justice are the proper concern not only of farmers, businessmen, and lawyers alone. By like token the operations of Tulare Lake Basin Water Storage District are of concern to every person resident therein.

Tulare Lake Basin Water Storage District is a political subdivision of the State of California[1], closely akin in substance and function to an irrigation district.[2]

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[1]Plaintiff's Exhibit 14 is an opinion of the Attorney General of California dated February 20, 1969, the salient portion of which is as follows: "I have concluded that water storage districts are considered political subdivisions of the State". Compare the language of *Avery v. Midland County*, 390 U.S. 474, 479 (1968): "The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State".

[2]Calif. Water Code §39060 is as follows: "The [water storage] districts formed pursuant to this division are districts of the nature of irrigation, reclamation, or drainage districts in respect to all matters contemplated in the provisions of the constitution of the State of California relating to irrigation, reclamation, or drainage". Defendant district has conceded that water storage districts and irrigation districts "are virtually identical in all respects relevant to this case". Reply memorandum filed September 30, 1970, page 8.

The great difference is in government. In irrigation districts all registered voters have the franchise.[3] In water storage districts none may vote but landowners[4] and their vote is weighted; there is one vote for each one hundred dollars of assessed valulation.[5] The result is that almost all the seventy seven residents of the district are disenfranchised. Farmers leasing but not owning land, although vitally interested in and affected by the district's operation, have no voice in its governance. The hierarchy of votes among landowners runs from one vote each for certain very small landowners to 37,825 votes for the J. G. Boswell Company. As of the date of filing this litigation six of the eleven directors of the district were Boswell employees or stockholders. Elections have little point in such a system, and although California law provides for general elections in water storage districts every other year,[6] this district had had none since 1947.[7]

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[3]Calif. Water Code §20527; Elections Code §§20, 21.

[4]Calif. Water Code §41000.

[5]Calif. Water Code §41001.

[6]Calif. Water Code, §41300.

[7]Plaintiff Salyer Land Company called a special election in 1967, Calif. Water Code §41550. On May 19, 1967 the district's then and present president, longtime Boswell employee, director and stockholder Louis T. Robinson, addressed the California Districts Securities Commission as follows:

"MR. ROBINSON: I know you shouldn't forecast elections and that causes me a little hesitancy to say what I am going to say.

"*The eleven divisions in this large farming operation are completely controlled.* You are going to have the same eleven directors on Tuesday that you have got today—with one exception. One of the directors is having some health trouble and he is going to be replaced; but other than that, they are going to be the same eleven directors."

"MR. ROBINSON: Well, *I have no concern about the election.*

(This footnote is continued on next page)

Under California law a unit such as Tulare Lake Basin Water Storage District is exclusively governmental.[8] Upon formation of a water storage district all water rights of the state within the district are given, set apart and dedicated to it.[9] Water is the life blood of California; the special importance of water is recognized both by its constitution[10] and statutes.[11]

Apart from its control of California's most vital natural resource, Tulare Lake Basin Water Storage District acts in a governmental capacity. It had a budget of $481,000 in 1970 and $405,000 in 1971. It owns laterals connecting with the California Aqueduct which have been constructed "at a cost of approximately $2,500,000."[12] It possesses and has exercised the power of eminent domain.[13] It enjoys the tax immunity granted by the State of California to public bodies.[14] It is subject to the provisions of the statute conferring govern-

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"But suddenly if a new board of directors were to come in, why then I would have nothing but opinion. But I have no concern about the election. *The eleven divisions are controlled by people with enough votes to put back the same directors they have now*—including the two Salyers that are dissenting at this time. They will be returned; the other nine will be returned."

(Emphases added throughout this brief.)

[8]"State agencies such as irrigation or reclamation districts * * * are agencies of the state whose functions *are considered exclusively governmental;* their property is state owned, held only for governmental purposes; they own no land in the proprietary sense." *Glenn-Colusa Irrigation District v. Ohrt*, 31 Cal.App.2d 619, 88 P.2d 763, 765 (1939).

[9]Calif. Water Code, §43158.

[10]Article 14, Section 3: "It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable. . . ."

[11]Calif. Water Code, §§100, 102, 104, 105.

[12]Answer of defendant, page 8.

[13]Calif. Water Code, §43530.

[14]Calif. Water Code §43508.

mental immunities and to the exceptions therefrom imposing liability.[15] It may issue general obligation bonds secured by assessments levied on the lands in the district.[16] The district may provide tolls and charges for the use of water, irrigation, and power,[17] and it may sell surplus water and power.[18]

Tulare Lake Basin Water Storage District submitted the opinion of the Attorney General of California that it is a political subdivision of the state as part of an application for federal monies, pursuant to the Federal Disaster Act, Public Law 875, and received $234,512.24 from the federal government pursuant to that application. The federal legislation authorizing this expenditure limited the grants to "any project of a State, county, municipal or other local government agency for flood control, navigation, irrigation, reclamation, public power, sewage treatment, water treatment, watershed development, or airport construction. . . ."[19]

The defendant district comprises most of the dry bed[20] of Tulare Lake in Kings and Tulare Counties, California. Four major operators, the J. G. Boswell Company, plaintiff Salyer Land Company, West Lake Farms and South Lake Farms, farm almost eighty five

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[15]Calif. Government Code, §811.2.

[16]Calif. Water Code §§4550 ff.

[17]Calif. Water Code §§43006 ff., Calif. Water Code §§43025 ff.

[18]Calif. Water Code §§43507, 43533, 43555, 43001, 43026. An official summary of the powers and functions of water storage districts, taken from Bulletin No. 155, Department of Water Resources, State of California, "General Comparison of California Water District Acts", is attached as Appendix A.

[19]42 U.S.C.A. §1855ee.

[20]The great flood of 1969, largest since the legendary flood of 1906, inundated approximately 88,000 of the district's 193,000 acres. Evaporation and irrigation use gradually dissipated the water, and the lake area became completely dry again in August, 1971.

per cent of the land in the district. The remaining fifteen per cent is farmed by smaller farmers; if the latter be lessees they are accorded no voice whatever in the functions of the district. The *amici curiae*[21] and the defendant have been at some pains to justify this situation. Counsel for California Central Valleys Flood Control Association claimed below that this problem

> "... is easily remedied within the existing procedure by the tenant requesting in his lease a provision for a proxy from the lessor (as allowed in Section 41,002) to cast the lessor's votes in district elections in exchange for the obligation to pay the district assessments on the land leased."[22]

Counsel for the Irrigation District Association of California put it like this:

> "Certainly, lessees of owners have a more direct interest and are perhaps more greatly 'affected' by District activities. Many leases, however, are on a one year or year to year basis. In each case their occupancy is contractual so to that extent they may bargain for and receive such as-

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[21]The California Central Valleys Flood Control Association filed a brief *amicus curiae* in the court below upon its representation that its constituent district "all vote on the same basis as the defendant in this action, and accordingly the decision rendered herein will have drastic and far reaching effects upon all reclamation districts in California". The Irrigation Districts Association of California also filed a brief *amicus curiae* below, stating that that Association "is vitally interested in any attack on landowner voting qualifications in view of the fact that a majority of the over 250 public districts which are members of the Association, use landownership voting principles in some form or another under the various State statutes under which they are formed. The members of the Association distribute for irrigation, municipal and domestic use, over 75% of the water in the State of California".

[22]Brief below of California Central Valleys Flood Control Association, page 10.

surances as they request as to how the landowner will act in reference to his control over District activities."[23]

The defendant district was more candid than either of the *amici:*

> "... If the lessee's bargaining position is strong enough, he can perhaps by contract acquire a proxy to cast his landowner's ballots. If his bargaining position is not that strong, he will have to make the best deal he can. ..."[24]

Judge Browning was unimpressed with this reasoning.

> "Defendant suggests that the lessees might obtain a provision in the lease for a proxy from the lessor as allowed by §41002. If a statute otherwise infringes upon the Equal Protection Clause, the infringement of constitutional rights is not ameliorated by a possibility that relief might be obtained through private contracts."

The majority below did not discuss the problem of the farmer lessees. This voteless group is obviously interested and affected, by any criterion, and Judge Browning addressed himself to the issue:

> "Contrary to the majority's view, however, this is not true of the exclusion of those who lease lands in the district for farming. This group's interest in the district's projects to increase the water available for farming and to improve its distribution is indistinguishable from the interest of the owners. They are also equally interested in the cost of the district's projects, for this expense

[23]Brief in the trial court of Irrigation Districts Association of California, page 20.

[24]Defendant's Reply Brief in the trial court, pages 9, 10.

> will be passed on to them by express agreement or in the form of increased rentals. *See, e.g., Phoenix v. Kolodziejski, supra,* 399 U.S. 204, 210-11. And obviously the state's interest in intelligent and responsible decisions regarding the district's water management program is not advanced by excluding those who actually farm the land."

The Court below was unanimous in permitting the exclusion of plaintiff Lawrence Ellison from the ballot, despite the fact that Ellison is 62, has been in the area for forty years, has held responsible positions with several of the larger agricultural operators in the district, is interested in water matters, is a registered voter and a resident of the district, and would like to vote. It is said that he does not have a sufficient interest. It is difficult to agree. He lost his job with The J. G. Boswell Company because of layoffs occasioned by the 1969 flood. The record in this case demonstrates that the flooded area was increased over three feet in depth by the reception of 300,000 acre feet of flood water from the Kern River. This would have been reduced to approximately 100,000 acre feet had Buena Vista Lake been used for flood storage.[35] In past years the flood waters of the Kern River have filled Buena Vista Lake in Kern County before going on to Tulare Lake.[20] 1969 is the first year in recorded history in which this was not the case. The record made in the trial court shows that the non-Boswell directors of the defendant district sought to have it take action to ensure that Buena Vista Lake receive the floor waters of the Kern

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[35]A record was made on this in the court below, and the fact is not disputed by defendant.

[20]A map showing the relative positions of Buena Vista Lake and Tulare Lake is in the record as Exhibit 4, and has been reproduced in the Appendix.

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to its full capacity, a position the record demonstrates the defendant district uniformly to have taken in the past. In 1969 the six votes of The J. G. Boswell Company were cast to prevent the defendant district from so acting; the reason for the break with precedent was that in 1969 The J. G. Boswell Company was itself farming the whole of Buena Vista Lake. It was at this time that plaintiff Salyer Land Company, which itself farms some 40,000 acres inside and outside the defendant district, and whose interest might reasonably be supposed to have lain with weighted landowner voting, became convinced that it was a poor system. But those who say that the residents have no interest were not at Tulare Lake in 1969. The water rose to a height of 192.5 U.S.G.S. datum, higher than any residence in the district. Had the major levees broken, the homes would have been flooded. The minutes of the meeting of the board of directors of the defendant district held March 4, 1969, at the height of the flood emergency, are plaintiffs' Exhibit 6 in the record made in the court below. That meeting determined, on a vote of six[27] to four, that the flood waters of the Kern River would come into the district, while Buena Vista Lake remained dry. Anyone who says that persons occupying homes in the district were

[27]The six Boswell directors were in conflict of interest because of the Boswell Company's possession of Buena Vista Lake, and the point was made at the meeting that they should have been disqualified on the issue. Boswell counsel appeared at the meeting and the minutes state as follows:

"Attorney Kloster at this point made disclosures for the record as to the association of six of the directors with the J. G. Boswell Company, indicating in some detail their stock ownership and employee affiliations. The six directors were Armor, Barnes, Evers, Fisher, Robinson and Vandergriff. He stated further that he had advised these directors they were not disqualified to vote with reference to the Buena Vista matter."

not vitally interested in and affected by that decision, with great respect, simply was not there.

Even more indefensible than the exclusion of residents from the franchise, however, is the weighting of the ballot by assessed valuation. The result is to give several of the smaller landowners one vote each. Thomas J. Amos has one vote, as do Ada Hornbeak and Rose Catanz. Plaintiff Harold Shawl shares 23 votes with his partner, springing from the ownership of 65 acres. But The J. G. Boswell Company is entitled to vote 37,825 times. Judge Browning dissented from the majority on the issue of the weighted franchise:

> "Defendant has identified no compelling state interest in weighted voting in water storage district elections.
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> * * *
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> "Neither can it be said that the state's interest in intelligent and responsible elections is served by weighted voting. There is nothing in the record to support the assumption that a small landowner is less likely than a large one to possess the information and understanding of water development problems that is requisite to intelligent and responsible voting on the affairs of a water storage district. *Cf. Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966). And the landowner's interest in finding and implementing solutions to those problems is no less acute because his operation is small. Efficient production from his smaller acreage may be of greater economic consequence to him; and the lesser absolute share of the cost of district projects he may be required to bear may impose a greater burden. As Judge Wisdom said in a related context, 'In terms of voting re-

sponsibility, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.' *Stewart v. Parish School Board of Parish of St. Charles,* 310 F. Supp. 1172, 1179 (E.D. La. 1970), *aff'd* 400 U.S. 884 1970). *See also Burrey v. Embarcadero Municipal Improvement District,* 5 Cal. 3d 671 (1971)."

It is submitted that Judge Browning's view is sustained by the decisions of this Court. In *Gray v. Sanders,*[28] this Court asked, "How . . . can one person be given twice or ten times the voting power of another person . . .?"[29] In *Gray* the Court went on to speak of "equality among those that meet the basic qualifications".[30] In *Reynolds v. Sims,*[31] this Court thought it "inconceivable" that a state law could permit the votes of some citizens to be "multiplied by two, five or 10. . . ."[32] In *Harper v. Virginia State Board of Elections*[33] this Court held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth. . . ."[34] In *Harper* this Court went on to say that "Wealth, like race, creed, or color, is not germane to one's

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[28]372 U.S. 368 (1963).
[29]372 U.S. at 379.
[30]372 U.S. at 380.
[31]377 U.S. 533 (1964).
[32]377 U.S. at 562.
[33]383 U.S. 663 (1966).
[34]383 U.S. at 666.

ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race [Cits. omitted] are traditionally disfavored. [Cits. omitted]. To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."[38] "For to repeat, wealth . . . has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned".[39]

In *Kramer v. Union Free School District*,[37] this Court struck down a New York statute limiting the franchise in certain school districts to those who owned or leased real estate, or who were the parents of school children. In *Cipriano v. City of Houma*[38] and *Phoenix v. Kolodziejski*,[39] this Court struck down statutes of Louisiana and Arizona limiting the franchise in revenue and general obligation bond elections; respectively, to property owners.[40] In *Hadley v. Junior College District*,[41] this Court held that "once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded'."[42]

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[38]383 U.S. at 668.
[39]383 U.S. at 670.
[37]395 U.S. 621 (1969).
[38]395 U.S. 701 (1969).
[39]399 U.S. 204 (1970).

[40]In *Phoenix* Mr. Justice White said, "Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. . . .

[41]397 U.S. 50 (1970).
[42]397 U.S. at 58, 59.

In *Gordon v. Lance*,[43] Mr. Chief Justice Burger stated as follows:

> "While Cipriano involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective. See Stewart v. Parish School Board, 310 F. Supp. 1172 (E.D. La.) aff'd, 400 U.S. 884 (1970)."[44]

Stewart, the case cited by the Chief Justice, was a three-judge court decision involving constitutionality of a Louisiana statute limiting the franchise to property owners, and providing also for weighted voting. The decision was affirmed by the Supreme Court,[45] and that affirmance has precedential value. Let us examine what was affirmed in *Stewart:*

> "By gearing the weight of each elector's vote to the amount of his assessed property the laws debase the vote of small landowners. We hold therefore that the exclusion of all non-property taxpayers and the dilution of the small property holder's vote violate the Equal Protection Clause of the Fourteenth Amendment."[46]
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> * * *
>
> "*Kramer* and *Cipriano*, with the aid of Reynolds v. Sims, *Avery* and *Harper*, teach that laws restricting the right to vote—*we say, in any election*—do not carry the usual presumption of constitutionality."[47]
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[43] 403 U.S. 1 (1971).
[44] 403 U.S. at 4.
[45] 400 U.S. 884 (1970).
[46] 310 F.Supp. at 1173.
[47] 310 F.Supp. at 1176.

"A significant result of this reading of *Kramer* is that property qualifications *simpliciter* may no longer be acceptable eligibility tests, even in such traditional areas as school millage or sewer assessment elections. It would make no difference that a community's tax structure was such that only property owners directly paid for such proposals. The Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and stake in the quality of the schools the young attend and the operation of the sewers which make the city habitable."[48]

* * *

"There are obvious differences between the case before the court and Kramer, Cipriano, and Turner. It is significant, however, that in none of the cases did the Supreme Court recognize a constitutional difference between a general election and a special-purpose election."[49]

* * *

"The requirement that the bond issue be approved by a majority of the taxpayers voting representing a 'majority of the assessed property owned by those taxpayers who are actually voting' apparently rests on the assumption, first, that property owners have a special pecuniary interest; second, that the larger the assessment the greater the interest and the greater the need to protect large property owners from irresponsible owners having no property."[50]

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[48] *Ibid.*
[49] 310 F.Supp. at 1177.
[50] 310 F.Supp. at 1179.

"In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.

"The actual effect of gearing assessments to the vote is simply to dilute the participation of small landowners and to exaggerate the participation of large landowners in violation of the one man, one vote canon."[51]

* * *

"There are two constitutional issues in this case: first, the restriction of the franchise to property taxpayers; second, the requirement that the majority of the voters represent a "majority of the assessed property'. Since the Court agrees with the plaintiffs on the first issue, it might be said that it is unnecessary to reach the second issue. But the two limitations have been inseparable since 1898. Moreover, weighting the vote in favor of the large property owner points up the unsoundness of limiting the vote to property taxpayers."[52]

* * *

"At this point in history, this is an intolerable discrimination."[53]

It is not possible to reconcile the reasoning and result in *Stewart* with the reasoning and result of the court below in the case at bar.

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[51] *Ibid.*
[52] 310 F.Supp. at 1180.
[53] *Ibid.*

State court decisions concerning landowner qualifications and weighted voting in special districts are now in considerable confusion. This situation is pointed up by decisions in September and November from the Supreme Courts of California and Wyoming. In *Burrey v. Embarcadero Municipal Improvement District*,[84] the California Supreme Court gave short shrift to a statute limiting the franchise to landowners and giving each landowner "one vote for each one dollar ($1) in assessed valuation of land owned by him. . . ." The Court said that "the equality principle . . . is applicable when the weighted vote is based on property value . . ."[85] and found the system "inconceivable" and "extraordinary".[86]

> "In conclusion, it would be difficult to imagine a more radical variation in voting strength than results from this land value voting scheme. As Wallover, Inc. itself assets, the weighting of votes by land value has continued to guarantee that corporation well over a majority of the votes. Instead of 'one person, one vote' we have here a case of 'one corporation, 285,689 votes.' "[87]

The California Supreme Court in *Burrey* relied heavily on this Court's decisions in *Avery, Hadley, Reynolds, Phoenix, Harper, Kramer,* and *Cipriano.* But two months later the Supreme Court of Wyoming, decrying "a tendency for judges and courts to overreact to decisions of the United States Supreme Court", held in *Associated Enterprises, Inc. v. Toltec Watershed Im-*

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[84] 5 Cal. 3d 671, 97 Cal.Rptr. 203, 488 P.2d 395 (1971).
[85] 5 Cal. 3d at 678.
[86] *Ibid.*
[87] 5 Cal. 3d at 679. Compare the situation of the J. G. Boswell Company in the case at bar.

provement District[58] that a Wyoming statute limiting the franchise to landowners with provision for a weighting factor for acreage, was not invalid. The Court quoted with approval from a 1902 Missouri case:[59]

> "The fact that each owner is entitled to one vote for every acre of land owned by him creates no more infirmity in the law than the right of each stockholder of any corporation to cast as many votes as he owns shares of stock renders such laws invalid. In both instances the majority in interest, instead of the majority in number, controls; and who shall say such laws are not just?"[60]

The Wyoming Court also relied on a 1908 decision from Nebraska, *State ex rel. Harris v. Hanson.*[61] The essence of the *Harris* decision is as follows:

> ". . . [I]t cannot be said that the formation of the district was illegal because electors of the district owning no real estate were barred from participating therein, or because each property owner was given a vote for each acre or lot of land he owned."[62]

The interesting thing is that the Nebraska court relied on the old California case of *People ex rel. Van Loben*

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[58]..... Wy. ....., 490 P.2d 1069 (1971). *Toltec* was appealed to this Court, as No. 71-1069. Probable jurisdiction was noted June 12, 1972.

[59]*Mound City Land & Stock Co. v. Miller,* 170 Mo. 240, 70 S.W. 721 (1902).

[60]490 P.2d at 1072.

[61]80 Neb. 724, 115 N.W. 294, 80 Neb. 738, 117 N.W. 412 (1908).

[62]115 N.W. at 298.

Sels v. Reclamation District No. 551,[64] a decision of dubious value in the state of its origin. The California Supreme Court in *Burrey* refers to it as one of "a series of old California cases" and says, "We need not comment upon the continuing validity of these cases; they do not govern here".[65] It is not possible to reconcile the reasoning and result in *Toltec* with the reasoning and result in *Burrey*, just as it is not possible to reconcile the reasoning and result in the case at bar with *Burrey*, *Stewart*, or this Court's decisions in *Harper*, *Hadley*, *Kramer*, *Cipriano*, and *Phoenix*.

The intermediate appellate courts in California have also wrestled with the problem. In *Schindler v. Palo Verde Irrigation District*[66] the statute concerned limited the franchise to landowners, and gave them "one vote for each $100 of assessed value of his property . . ." A small landowner sued to establish the principle of "one landowner—one vote". The California Court of Appeal for the Fourth Appellate District held that the Voting Rights Cases apply to an irrigation district.[66] But it nevertheless sustained weighted voting

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[64] 117 Cal. 114, 48 Pac. 1016 (1897).

[65] 5 Cal. 3d at 677.

[66] 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969).

[66] "As we interpret *Kramer*, *supra*, the guidelines laid down in it must be followed in testing the constitutionality of a statutory distribution of voting rights in elections pertaining to the affairs of a governmental unit or public corporation whether it be a school district or some other limited special purpose unit. * * * We perceive no logical basis for holding that the same constitutional standards of fairness governing distribution of the election franchise for school district elections should not be applicable to elections pertaining to special entities exercising other limited governmental funtions. * * * Schools as well as water service may be private or public. But when the state engages in those activities through a governmental agency and provides for citizen participation through the election process, the distribution of voting rights must meet the equal protection standards prescribed in *Kramer* and *Cipriano*." 1 Cal. App. 3d at 837.

according to the assessed value of landownership.[67] It is not likely that *Schindler* would have been sustained on appeal. No hearing was sought in the California Supreme Court; that Court in the course of the opinion in *Burrey* spoke of *Schindler* with some asperity.[68]

Throughout the proceedings in this case the defendant has argued it is not a unit of government to which the standards of the voting rights cases apply. The posture of that issue in the Supreme Court is now of some interest. For the court below unanimously found the defendant district to be malapportioned, and directed that its eleven divisions be so cast as to reflect approximately the same number of dollars. ***But the necessary predicate of the decision on apportionment is that Tulare Lake Basin Water Storage District is sufficiently a governmental body to require such judicial intervention, Reynolds v. Simms,[69] Avery v. Midland County,[70] and the defendant district has not appealed that portion of the judgment.*** The present appellants appealed only that part of the judgment which refused to strike down

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[67]". . . [T]he grant of franchise in proportion to the assessed value of landownership fairly distributes voting influence among those primarily and directly interested in direct proportion to the stake each has in the District." 1 Cal. App. 3d at 839.

[68]"This decision may be difficult to reconcile with the Supreme Court cases on this subject, particularly Kolodziejski which was decided after Schindler. (See Girth v. Thompson (1970) 11 Cal. App. 3d 325, 330, 89 Cal. Rptr. 823.) However, since irrigation districts are substantially different from the EMID—their powers are fewer and more limited to the particular purpose for which the districts were created—we do not reach that question here." *Burrey v. Embarcadero Municipal Improvement District,* 5 Cal. 3d 671, 682 (1971). The *Girth* case, cited with approval by the court in *Burrey,* held that the voting rights cases applied to an irrigation district and disapproved of an earlier contrary holding in *Thompson v. Board of Directors,* 247 Cal. App. 2d 587 (1967).

[69]377 U.S. 533 (1964).

[70]390 U.S. 474 (1968).

§§41000 and 41001 of the Water Code. It results that the decision below finding the district to be malapportioned, and requiring it to be reapportioned, is not before the Supreme Court. These appellants submit that the predicate for that decision, that Tulare Lake Basin Water Storage District is sufficiently a governmental unit to justify the district court's intervention, is now the law of the case, there having been no appeal.

Conclusion.

Tulare Lake Basin Water Storage District is an abberration, a relic in the twentieth century. Plato described oligarchy as "government resting on a valuation of property";[11] and §41001 of the California Water Code is nothing less than a legislative mandate for oligarchy.

The residents of Tulare Lake Basin Water Storage District should be admitted to the franchise, whether or not they own land. Farmers leasing land in that district should be permitted to vote in its elections. The landowners in that district should have an equal franchise. It is respectfully submitted that these appellants, plaintiffs below, are entitled to a decree that §§41000 and 41001 of the California Water Code are constitutionally infirm.

Dated this 9th day of August, 1972.

C. Ray Robinson,
Thomas Keister Greer,
Counsel for Appellants.

[11]The Republic (Bakewell Ed., p. 323).

APPENDIX A.

Bulletin No. 155, Department of Water Resources, State of California, "General Comparison of California Water District Acts" pp. 103-105 (1965):

"WATER STORAGE DISTRICTS

1 Citation	Water Code, Div. 14 comprising Secs. 39000-48401 (derived from 1921:914:1727, D. A. 9126). "California Water Storage District Law".
2 Purposes	Storage and distribution of water; drainage and reclamation in connection therewith; generation and distribution of power incidental thereto (Secs. 42200, 43000, 43025); such uses are a public use (Sec. 39061).
3 Territory	Lands already irrigated or susceptible of irrigation from a common source and by same system; need not be contiguous (Secs. 39400-39402).
4 Overlap	May include land in other agencies including other water storage districts having different plans, purposes, and objects (Sec. 39401).
5 Pet'rs.	Majority of holders of title or evidence of title representing majority in value of lands, or 500 holders of 10% in value (Sec. 39400); cost bond required (Sec. 39428).
6 Pet. to	Department of Water Resources (Sec. 39430).
7 Procedure	Petition to, and investigation, hearing and order by Dept. of Water Resources, election (majority vote) (Secs. 39400-40103).

8	Voting	1 vote for each $100, or fraction, assessed value of land exclusive of improvements, minerals, and mineral rights; proxy vote allowed (Secs. 41000-41002).
9	Records	Order following hearing on petition and formation, project abandonment, exclusion, and inclusion orders: County Recorder of each county where lands located (Secs. 39779, 40101, 42359, 48081, 48229, 48258); formation, inclusion, and 48258); formation, inclusion, and exclusion records: Secretary of State (Secs. 40104, 40659, 48300).
10	Gov. Code Sec. 54900	Not applicable—assessments not on ad valorem basis.
11	Gov. Bd.	5, 7, 9, or 11 Directors, depending on number of divisions (Secs. 39777, 39928).
12	Eminent Domain	All property necessary for projects of district; private property devoted to use of other districts, cities, or counties may not be taken (Sec. 43530); may not condemn in another county without approval of board of supervisors of affected county (Sec. 43532.5).
13	State and Fed. Coop.	May cooperate and contract with the State and the U.S. under any laws of the State or the Fed. reclamation laws (Secs. 44000-44105); may enter into any agreement appertaining to or beneficial to dist. project (Sec. 43151).

14 Debt Seg.	See "Assessments".
15 Bonds	General obligation, by majority of votes cast by assessed voters (Secs. 45100, 45270, 45400); but see Secs. 42330, 41000 re vote required on adoption of projects and at general elections. General obligation bonds without election upon ⅔ vote of district board and approved by the department or (after July 1, 1965) the Calif. Dists. Sec. Com., if project or contract approved at election and assessments outstanding (Sec. 45102). Unpaid warrants draw interest (Sec. 44626). May issue interest-bearing warrants payable at a future time, the total amount payable in any year not to exceed ¼ of 1% of assessed valuation of land unless approved by the department or (after July 1, 1965) the Calif. Dists. Sec. Commission and may not extend over 5 years unless approved by majority vote at an election (Secs. 44900-44911); may issue direct assessment warrants by ⅔ vote of board and approval of the department or (after July 1, 1965) the Calif. Dist. Sec. Com. to finance project or contract approved at an election (Secs. 45900, 46381).
16 Revenues	Tolls and charges for use of water, irrigation, and other services (Secs 43006, 43007, 47180); power revenues (Secs. 43025, 43026, 47700. 47701); sales of surplus property, water and power (Secs. 43507, 43533, 43555, 43001, 43026); leases (Sec. 43506).

17	Assessments	Assessments for organization and other preliminary expenses equally upon each acre up to $2; additional preliminary assessments up to $2.50 for new projects (Secs. 46000 46009); for all other purposes, assessments of lands according to benefits; may be payable in installments (Secs. 46150-47701, 44030-44032); interim project assessments on each acre, up to $2 per acre (Secs. 46375-46381).
18	Tax. of Dist. Prop.	Dist. works, including reservoirs, dams, rights of way, canals, power plants, transmission lines, etc., not taxable for state, county or city purposes (Sec. 43508).
19	Districts Sec. Com.	Financial supervision and bond certification approval under Dists. Sec. Com. Law is requested (Secs. 44911. 45100, 45101 (operative until July 1, 1965), 45701; Water Code, Sec. 20003); after July 1, 1965, bonds may be issued unless certified (Sec. 45100); keep records (Sec. 43159). After July 1, 1965, perform following duties now exercised by the Dept. of Water Resources: Supervise levy of assessments (Secs. 46000-46381), see that assessments are levied (Sec. 40382), appoint assessment commissioners (Secs. 42355, 46150, 46355, 47551) and issue warrants for their compensation (Secs. 44600, 46154), appoint tax adjustment board (Sec. 46225), supervise au-

thorization and construction of works (Secs. 42200-42752, 44005, 46150), approve purchases in excess of $500,000 (Sec. 43503), examine progress reports and financial statements and make recommendations thereon (Sec. 44430), examine district affairs and make reports (Sec. 44431), prescribe form of district reports and accounts (Sec. 44432), approve issuance of district warrants payable at future times (Sec. 44904), approve issuance of bonds without an election (Sec. 45102), approve direct assessment warrants (Sec. 45900), approve preliminary assessments in excess of 50¢ (Sec. 46008), approve interim project assessments (Sec. 46377).

20 Dept. of Wat. Res.

Receive petitions for formation, investigate, hold elections and supervise organization of new districts (Secs. 39400-40103); give information and make preliminary investigations (Secs. 39081-39082); keep records (Sec. 43159); execute warrants (Secs. 39603, 44600); investigate under Dists. Sec. Com. Law (see "Districts Sec. Com."); fill board vacancies (Sec. 40500); appoint directors where election not required (Sec. 41307). Until July 1, 1965, redivide districts (Sec. 41152); supervise exclusions (Secs. 48000-48087) and inclusions (Secs. 48200-48260); see also "Districts Sec. Com." After July 1, 1965, upon re-

		quest of Calif. Dists. Sec. Com., investigate and report on feasibility of district projects or their abandonment (Secs. 42300, 42500).
21	Inclusion Exclusion	Inclusion (adjacent lands, irrigable from dist. works, if for best interest or district): by petition, hearing, order of the board, and election if sufficient protests made (Secs. 48200-48260); land may be subject to prior capital assessments (Sec. 47550). Exclusion (lands not benefited or if for best interests of district): by petition, hearing, and order of the board (Secs. 48000-48087). Consolidation provided (Sec. 48350).
22	Dissolution	Same as for irrigation districts (Sec. 48400); also dissolved by failure to file report on plans within 10 years (Dept. of Water Resources or, after July 1, 1965, the Calif. Dists. Sec. Com. may extend time 15 years) or by abandonment of plans or failure of voters to approve plans (Secs. 42280, 42360, 42552).
23	No.	9."